

Supreme Court of the State of New York
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

Michael R. Sak, Jr., Clerk

Docket No. 77-444

PENN CENTRAL TRANSPORTATION COMPANY,
THE NEW YORK AND HARLEM RAILROAD
COMPANY, THE 51ST STREET REALTY
CORPORATION, UGP PROPERTIES, INC.,

Appellants,

v.

THE CITY OF NEW YORK, et al.,

Appellees.

On Appeal from the Court of Appeals
of the State of New York.

MOTION TO DISMISS

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MOTION TO DISMISS

Pursuant to Rule 16 of the Rules of
this Court, the appellees moves to dismiss
the appeal herein on the ground that it
does not present a substantial federal
question.

QUESTION PRESENTED

Where a municipal building regulation
is challenged on economic grounds, but it

is not established that the regulation precludes a reasonable return on the value of the building, has the owner been denied substantive due process?

FACTS

(1)

In 1965, New York City, acting pursuant to state enabling legislation, provided for landmark preservation by adding Section 2004 to the New York City Charter and Chapter 8-A (Sections 205-1.0 et seq.) to the Administrative Code (Local Law #46). Section 205-1.0 of the Code set forth the purpose and public policy behind the enactment (A76a).* The Council

*Numbers preceded by the letter A refer to pages in the Appendix to the Jurisdictional Statement. Numbers not preceded by the letter A refer to pages in the Record on Appeal in the Court of Appeals.

set forth its findings and declared as a matter of policy that the "protection, enhancement, perpetuation and use of improvements of special character or special historical or aesthetic interest or value is a public necessity and is required in the interest of the health, prosperity, safety, and welfare of the people."

Section 2004 of the New York City Charter establishes a Landmarks Preservation Commission, composed of 11 members including at least three architects, one historian qualified in the field, one city planner or landscape architect, and one realtor; also the membership shall include at least one resident of each of the five boroughs.

It is the Commission's task, after public hearing, to designate landmark properties and historic districts. Admin. Code §207-2.0(A84a). The Board of Estimate is to approve, disapprove or modify the designation, but, before it does so, the Board "shall refer such designation or amendment thereof to the City Planning Commission, which, within thirty days after such referral, shall submit to such board a report with respect to the relation of such designation or amendment thereof to the master plan, the zoning resolution, projected public improvements and any plan for the renewal of the area involved."

Once a landmark is designated, the ordinance requires that those in charge of it keep it "in good repair." Section 207-10.0 (A104a). In addition, the

Commission is authorized to regulate construction, reconstruction, alteration and demolition on a landmark site. Section 207-4.0 (A88a). Comprehensive procedures are provided where one wishes to make such changes. A landmark owner may seek a "certificate of no exterior effect" or, if there will be exterior effect, a permit for minor work or a "certificate of appropriateness." Section 207-5.0-207-7.0 (A90a-93a). As to taxpaying commercial properties, there is also a procedure for seeking a certificate of appropriateness authorizing demolition on the ground of insufficient return. A similar procedure, providing for different forms of relief, is available to certain tax-exempt properties used for charitable purposes. Section 207-8.0 (A94a).

(2)

Related to the Landmarks Law are certain amendments to the New York City Zoning Resolution, which permit the transfer of unused development rights over landmark properties located in certain high density areas of the City to other nearby sites. Zoning Resolution, Sections 74-79 to 74-793 (All3a-118a). The transfer of these rights will permit the owner of a designated landmark building to realize an economic gain by selling his unsued, but allowable development rights. City Planning Commission's Report (CP-20253), dated May 1, 1968.

The original May 1968 transfer provisions authorized the City Planning Commission to grant a special permit for the transfer of development rights to adjacent sites. The maximum amount of

floor area that could be transferred was the basic maximum allowable floor area on the zoning lot less the total floor area of all buildings on the landmark lot (in effect, the total unused development rights), but the permitted floor area increase on any recipient lot was limited to 20% of the floor area otherwise permitted on the recipient site. Common ownership was not necessary.

In December 1969, Sections 74-79 et seq. of the Zoning Resolution were amended to expand the availability of transfers of development rights from landmark properties. In central business districts, the 20% limitation as to the recipient lots was removed (All3a). In addition the definition of adjacent lot was expanded to include also lots across the street from the landmark site. Penn Central has

a significant number of properties which come within this definition. See Exhibit 10, p. 1966, indicating such properties.

(3)

Grand Central Terminal was opened to the public in 1913. The architect for the Terminal was selected by nationwide competition. Reed & Stem of St. Paul, Minnesota won the competition introducing, inter alia, the concept of ramps. Later, Whitney Warren of Warren and Wetmore took over the architectural design of the Terminal and introduced the fine Beaux Arts facade. Also of note are the scale of the monumental columns, the handsome sculptured details, the main concourse with the constellations painted by Paul Heller, and the monumental statuary group (Mercury, Hercules, and Minerva) atop the 42nd Street facade (see photographs at pages

2232-2238 of the Record in the Court of Appeals and Defts.' Exhs. D1-5).

On August 2, 1967, after a public hearing, the City's Landmarks Preservation Commission proposed the designation (later accepted by the Board of Estimate) of the Terminal as a landmark (2240-2241). In its report it stated, inter alia (2240):

"Grand Central Station, one of the great buildings of America evokes a spirit that is unique in this City. It combines distinguished architecture with a brilliant engineering solution, wedded to one of the most fabulous railroad terminals of our time. Monumental in scale, this great building functions as well today as it did when built. In style it represents the best of the French Beaux Arts."

(4)

On January 22, 1968, after the designation of Grand Central Terminal as a landmark, UGP, a United Kingdom corporation, entered into a lease and sublease

arrangement which provides for the "demise" of the development rights over Grand Central Terminal to UGP for the purpose of constructing an office building of approximately 56 stories over the Terminal and, in part, replacing portions of the landmark structure (1872-1957).

On July 18, 1968, the plaintiffs applied to the Landmarks Commission for a certificate of no exterior effect for the so called Breuer I plan (Breuer referring to the architect), a speculative office tower to be cantilevered over Grand Central Terminal. This request was denied on September 20, 1968 (13a, 25a, 2242, 331-336). On January 20, 1969, the plaintiffs applied to the Landmarks Commission for a certificate of appropriateness either for Breuer I or for a new proposal, Breuer II (2242). Prior to the public hearing

on the matter, it was discovered that the land on which Breuer II was proposed to be built included land over which the plaintiffs did not have control and that Breuer II would have interfered with certain existing New York City easements (2242-2243). Consequently plaintiffs prepared new plans, Breuer II Revised, to avoid these problems (1998-2002, 2252).

On August 26, 1969, a certificate of appropriateness was denied for all of the above proposals. In its report denying the certificate, the Landmarks Commission described the public hearings, described the two proposals and summarized the arguments that had been made. It also referred to alternatives that had been proposed for the transfer of development rights to nearby sites (2247). The

Commission concluded that the proposed towers would not be appropriate to and consistent with the effectuation of the purposes of the Landmarks Law (2242-2255).

The plaintiff did not seek judicial relief by way of a special proceeding pursuant to Article 78 of New York Civil Practice Law and Rules from the designation of Grand Central Terminal as a landmark, from the denial of a certificate of appropriateness, or from the denial of the certificate of no exterior effect.

(5)

On October 7, 1969, the plaintiffs initiated this lawsuit seeking declaratory and injunctive relief from the Landmarks Law on its face and as applied, and "compensation" for the alleged temporary taking of their property for the period between its designation as a landmark and

the judicial invalidation of such designation (7a-21a). A trial was held in which the evidence was presented by the parties with respect to plaintiffs' claims of hardship.

At the conclusion of the trial, the Supreme Court found that plaintiffs had proven economic hardship (A70a). The Supreme Court relied primarily on the income and expense statements submitted by the plaintiffs for 1969 and 1971, which showed that for those two years the revenues from the Terminal concessions were less than the expenses (A57a-58a). The Supreme Court did not attribute any value to the transfer of the unused development rights to other properties owned by Penn Central (A58a).

The Appellate Division of the Supreme Court of the State of New York (two justices dissenting) reversed the Supreme Court and dismissed the complaint (A27a). Reported at 50 AD 2d 265, 377 N.Y.S. 2d 20 (1st Dept., 1975). The Court, citing this Court's decision in Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962), found that the plaintiffs had not demonstrated that the challenged regulation deprived them of all reasonable beneficial use of their property (A26a-27a). With respect to the income and expense statements of 1969 and 1971 submitted by Penn Central, the Appellate Division noted that the statement had listed the income from the concessions but had listed, in the expense portion, railroad operating expenses as well as expenses of the concession business. In addition, no rental

value whatsoever was imputed to the vast space in the Terminal devoted to railroad purposes (A25a). The Appellate Division also found, inter alia, that the plaintiffs had not shown that the unused development rights could not be profitably transferred to other sites (A25a-26a).

In its order the Appellate Division set forth findings of fact and stated that the findings of fact made by the New York Supreme Court, accompanying the judgment appealed from, which were inconsistent with the findings of the Appellate Division, were reversed (A46a-47a). The findings of the Appellate Division are set forth in A47a-50a of the Jurisdictional Statement.

The Court of Appeals of the State of New York unanimously affirmed the order of the Appellate Division (A15a). Reported at

42 NY 2d 324, 366 N.E. 2d 1271 (1977). In its opinion the Court recognized the principle that government regulation would be invalid if it denied a property owner all reasonable return (A2a). The Court found that the plaintiffs had not demonstrated that the subject parcel, as restricted, was incapable of earning a reasonable return (A9a, 13a). The Court noted that a significant part of the value of the Terminal property was the result of governmental action such as tax exemptions, favored monopolies at public expense and subsidies (A7a-8a). The Court stated that the economic return of Grand Central should include an imputed value based on the increased business in the hotels and office buildings owned by Penn Central which is generated by the presence of the Terminal (A9a-10a).

The Court also found that the unused development rights over Grand Central had significant value and could be transferred to a number of other properties owned by Penn Central (Al1a-12a, 13a). It noted that construction of new office buildings was given serious consideration on two of the available receiving parcels, the sites of the Biltmore and Roosevelt Hotels (Al2a, 13a).

In concluding, the Court stated that Penn Central could present in the New York State Supreme Court any "additional submissions which, in light of this opinion may usefully develop further the factors discussed" (Al4a).

ARGUMENT

THE FEDERAL CONSTITUTIONAL QUESTION RAISED ON THIS APPEAL IS INSUBSTANTIAL. WHERE A MUNICIPAL BUILDING REGULATION IS CHALLENGED ON ECONOMIC GROUNDS, BUT IT IS NOT ESTABLISHED THAT THE REGULATION PRECLUDES A REASONABLE RETURN ON THE VALUE OF THE BUILDING, THE OWNER OF THE PROPERTY HAS NOT BEEN DENIED SUBSTANTIVE DUE PROCESS.

(1)

Where parties attack a land use regulation as unconstitutional and confiscatory, the burden is on them to establish sufficient facts to overcome the presumption of its constitutionality. Goldblatt v. Town of Hempstead, 369 U.S. 590, 592-593, 595-596 (1962). Thus, although the exercise of the police power to regulate the private use of real property is not without limitation, it is for the plaintiff in a particular case to establish that the line

separating valid regulation from confiscation has been breached.

Where the line will be drawn depends on an examination and balancing of three elements: how important the regulation is to the public good; how reasonably the regulation serves to achieve that good; and how substantially the regulation affects the economic viability of the particular parcel. In Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962), this Court set forth these three considerations as providing the test of the constitutionality of an ordinance prohibiting excavation below the water table. Preliminarily this Court found that, although the ordinance completely prohibited the plaintiff's sand and gravel mine and deprived the property of its most beneficial use, this did

not make it unconstitutional (pp. 592-593, 596). Nor did constitutionality hinge on whether the use prohibited was a common law nuisance (p. 593). This Court noted (p. 594): "Although a comparison of values before and after regulation is relevant, see Pennsylvania Coal Co. v. Mahon, [260 U.S. 393 (1922)], it is by no means conclusive, see Hadachek v. Sebastian, [239 U.S. 394 (1915)], where a diminution in value from \$800,000 to \$60,000 was upheld." In Goldblatt, this Court, applying the threefold test, concluded that the plaintiff had failed to meet its burden of presenting evidence sufficient to overcome the presumption of constitutionality. 369 U.S. at p. 596.

These principles have been applied where property has been restricted because of historic preservation legislation.

In Maier v. City of New Orleans, 516 F. 2d 1051 (5th Cir., 1975), cert. den. 426 U.S. 905 (1976), the Court of Appeals upheld the authority of the City of New Orleans to enact an architectural control ordinance applicable to the French Quarter of New Orleans. In dismissing the complaint, the Court of Appeals stated that the plaintiff was not entitled to relief because he could not demonstrate that the subject property, as restricted, could not yield a reasonable rate of return.

See also, Figarsky v. Historic District Commission of City of Norwich, 171 Conn. 198, 368 A. 2d 163, 171 (1976); First Presbyterian Church of York v. City Council of the City of York, 25 Pa C. 154, 360 A. 2d 257, 261 (Commonwealth Ct. of Pa., 1976); Redman v. City of Springfield,

111 ILL. App. 2d 430, 250 N.E. 2d 282 (1969); Opinion of the Justices to the Senate, 333 Mass. 773, 783, 128 N.E. 2d 557, 563 (1955); City of Santa Fe v. Gamble-Skogmo, Inc., 73 N.M. 410, 389 P. 2d 13 (1964); Town of Deering ex rel. Bittenbender v. Tibbetts, 105 N.H. 481, 202 A. 2d 232 (1964). Cf. Benenson v. United States, 548 F. 2d 939, 949 (Ct. Cl., 1977) (where a series of actions of the federal government over a fourteen year period were held to be an inverse condemnation because the designation precluded any profitable use of property).

In its Jurisdictional Statement, Penn Central agrees that it is now well established that landmarks legislation is an appropriate objective of governmental

action in the pursuit of public welfare (p. 11). As we noted above, the owner of property, in attacking a police power restriction on land use, must demonstrate hardship. The most appropriate proof would be to show that the parcel, as restricted, is incapable of producing a reasonable return. Plaintiffs have not met their burden.

There has been a complete failure of proof in the instant case. The plaintiffs' primary argument was that the Terminal, considered as a separate entity was unprofitable. As we discussed above, in support of that position the plaintiffs submitted a Statement of Revenues and Costs for the Terminal for 1969 and 1971 (2088-2091). These statements were prepared specifically for litigation (887, 896, 919). The statements reported the revenues from the concessions in the Terminal and deducted

expenses, many of which were attributable to the operation of the entire Terminal. The statement did not include any imputed rental value for those parts of the Terminal used for railroad purposes, including track areas, offices, storage and amenities (915, 2266, 2268).

In its order dismissing the complaint, the Appellate Division of the New York Supreme Court, in its findings of fact, stated that the statements of expenses and revenues were inaccurate because of their failure to impute rental value (A49a). In its findings of fact, the Appellate Division also rejected the other proof submitted by the plaintiffs on the question of economic return (A45a-50a). It also noted that the plaintiffs had failed to show that unused development rights could not have been profitably

transferred to one or more nearby sites (49a). In their proof the plaintiffs had ascribed no value to the transfer of development rights (A49a). The findings stated that the plaintiffs had failed to meet their burden of establishing that the Terminal was incapable of earning a reasonable rate of return (A48a).

Each of these findings of fact was affirmed by the New York Court of Appeals. Plaintiffs cannot attack these factual findings on this appeal. Indeed, plaintiffs in their Jurisdictional Statement state that they are not pressing their factual argument to this Court (p. 7, fn. 7).

These findings of fact preclude any argument by the plaintiffs that they have been denied substantive due process. These confirmed findings of fact demonstrate that the plaintiffs have failed to

establish that the parcel, as restricted, is incapable of earning a reasonable return. Thus, plaintiffs have not met any part of their burden of proof as is required by Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962), in an action attacking the constitutionality of the legislation as applied to their parcel.

The Jurisdictional Statement objects to the factors considered by the Court of Appeals in determining whether the plaintiffs demonstrated that the subject parcel, as restricted, is incapable of producing a reasonable rate of return. Such factors as the value added to Penn Central's real estate holdings in hotels and office buildings because of their proximity to the Terminal and government aid in the development of the Terminal are proper considerations in determining

value. However, this Court has noted that there are no specific criteria in determining reasonableness in an individual case. Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962).

The Court of Appeals also found that Penn Central received value in the potential grant of the unused transfer development rights (Alla, 12a). The testimony showed that the unused development rights could have been profitably transferred to two receiving parcels, the sites of the Biltmore and Roosevelt Hotels (481-485, 1331, 1676-1678). As we noted above, the New York Court of Appeals confirmed the finding of fact of the Appellate Division that the plaintiffs had failed to sustain their burden of proof on this issue.

In Goldblatt, supra, this Court noted that it could not determine that the ordinance was unreasonable because the plaintiff had failed to produce sufficient evidence 369 U.S. at p. 594. The instant case involves a similar failure of proof. Even if the factors used by the plaintiffs in their presentation in the New York State Supreme Court were used to determine whether the plaintiffs had been denied a reasonable rate of return, there is still no deprivation of due process, since as to each of such factors, the New York State courts made findings of fact that the plaintiffs had not proved their allegations.

CONCLUSION

THE APPEAL SHOULD BE
DISMISSED FOR WANT OF A SUB-
STANTIAL FEDERAL QUESTION.

November 16, 1977.

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